



STATE BOARD OF LAND COMMISSIONERS

Dirk Kempthorne, Governor and President of the Board
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Keith L. Johnson, State Controller
Marilyn Howard, Superintendent of Public Instruction

Winston A Wiggins, Secretary to the Board

Final Minutes Regular Land Board Meeting June 14, 2004

The regular meeting of the Idaho State Board of Land Commissioners was held on Monday, June 14, 2004 in Boise, Idaho. The meeting began at 9:15 a.m. The Honorable Dirk Kempthorne presided. The following members were present:

Honorable Secretary of State Ben Ysursa
Honorable Superintendent of Public Instruction Marilyn Howard

Secretary to the Board Winston A Wiggins

Attorney General Lawrence Wasden was absent from this meeting. State Controller Johnson participated in the meeting via conference phone.

Governor Kempthorne introduced Lance Giles. Mr. Giles replaces Scott Turlington as Policy Advisor to the Governor. Mr. Turlington accepted a position in the private sector.

• CONSENT

Director Wiggins provided background information on the Consent Agenda items.

At the request of Governor Kempthorne, a motion was made by Secretary of State Ysursa to approve the Consent Agenda with items 2 and 7 being moved to the Regular Agenda. Superintendent Howard seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

1. Director's Report – approved

- A. Interest Rate on Department Transactions – May 2004
- B. Bureau of Real Estate, Land Sale Section, Official Transactions – April 2004
- C. Bureau of Real Estate, Easement Section, Official Transactions – April 2004
- D. Bureau of Surface and Mineral Resources, Official Transactions – Deferred to July's Meeting
- E. Timber Sale Official Transactions – April 28 through May 25, 2004
- F. Timber Sale Activity Report – April – May 2004
- G. Legal Matter Summary

2. Endowment Fund Investment Board Manager's Report – Staffed by Matthew Haertzen, CFA, Manager of Investments, EFIB – This agenda item was moved to the Regular Agenda.

Mr. Haertzen highlighted some of the good news for this year. He stated it has been a very solid year for the Endowment Fund. Year-to-date the Endowment Fund is up about 15.3% with approximately two weeks left in the fiscal year. The forecast for a long-range expected return is 8% per year from the Endowment Fund so the Fund is almost double what would be expected. The market value gain from the

beginning of the fiscal year shows the Endowment Fund is up about \$96 million. Mr. Haertzen commended the Board for their fortitude through the difficult markets.

Month-to-date the account is up just under .6%. Most companies have finished announcing profits. First quarter profits came in very solid, and currently there is some stability in oil prices. News has been better in Iraq so investors are reasonably comfortable. With the June 30th deadline approaching, some increased volatility is expected in the markets. Mr. Haertzen is reasonably optimistic about the strength of the recovery. The jobs front has picked up and that will bode well from an equity market perspective.

On the fixed income side, the bond portion of the portfolio is down almost 1% fiscal year-to-date. Chairman Greenspan stated last week that, if needed, he will raise rates more aggressively than the measured pace he set earlier. Mr. Haertzen believes that the recovery will bode well from the equity perspective. He is not expecting a lot from the fixed income side. He does expect inflation to pick up, and that is why treasury inflation protective securities were set up a couple of months ago. As inflation picks up, those securities should provide real value and protection in a rising inflation environment.

Mr. Haertzen thanked the Board members who attended the Managers' Summit. He hopes the session was beneficial for all.

Governor Kempthorne noted Mr. Haertzen's comment that, with the transfer of sovereignty in Iraq on June 30th, he is anticipating some volatility in the marketplace. Also, with Homeland Security putting the country on a high level of alert with our own general election coming up, and having seen what happened in Spain, he asked Mr. Haertzen if a game plan is in place recognizing that this volatility may come to pass. Mr. Haertzen stated those possibilities have been considered. Managers look at risk levels on a day-to-day basis, but we are very much long-term investors. That is the key because all of these things can go strikingly well. If we take a very defensive posture, we could miss out on some exceptional returns in the markets. This is a long-term investment pool. We have to protect the beneficiaries for perpetuity and, as a result, there are very few actions that we will take in the interim to anticipate potential global uncertainties, other than looking at and making sure we are being paid from a risk perspective for the risk that we are taking.

Governor Kempthorne observed that right now the Fund is at twice what was expected as a return on investment. Mr. Haertzen stated the Fund is at twice what is expected in every given year. The target rate of return is about 8% per year with a 70/30 portfolio. However, when you look at the market, one year it is up 30, and the next year it is down 10, so you net that out. We are expecting over the next decade an average of about 8% per year return for the Endowment Fund. Governor Kempthorne asked if that occurs, when will the Fund be back to the high water mark. Mr. Haertzen responded the high water mark was \$803 million so that is roughly 5% from where the Fund is today. If the market gave a 4% return over the next six months, the Fund would be basically back to that high water mark.

Governor Kempthorne asked Mr. Haertzen if he is now stable with the manager pool. Mr. Haertzen stated he believes he is, however, he responded with a caveat. He stated he does not know what may come up tomorrow. He reminded the Board about the Strong Capital issue that arose. If something like that happened again, then another change would have to occur. Mr. Haertzen stated he is comfortable with the managers as they exist today given today's information. Normal turnover will probably be one or two managers per year. In situations where a portfolio manager leaves a firm, and he or she was the key investment person hired, that manager will be replaced. The current managers will be impacted by normal attrition and unforeseen issues, such as Strong Capital.

Superintendent Howard remarked that Public Schools is expecting the anticipated funds for payout in June. At that point, the process begins anew, and we will wait through the next year to see if the target is met again. Mr. Haertzen stated the forecast is that the full payment will be made. He stated the Fund will make that payment this week to clear up some accrual problems. At this point it is anticipated there will be sufficient earnings reserve dollars, with the reduction in payout level, to make the full 5% forecasted payout for Public Schools next year. Mr. Haertzen stated that most of the credit for the payout goes to

the Department of Lands for increased timber sale dollars. Department staff brought in revenues that were well above expectations this year. That is why Public Schools is receiving full payment.

Secretary of State Ysursa commended Mr. Haertzen and his staff for a job well done. He also commended Governor Kempthorne for his diligence in driving communication between the Land Board and the Endowment Fund Investment Board.

Governor Kempthorne thanked Mr. Haertzen and the Endowment Fund Investment Board for their hard work.

BOARD ACTION: A motion was made by Secretary of State Ysursa to accept the Manager's report. Superintendent Howard seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

3. Timber Sales – Staffed by Bob Helmer, Chief, Bureau of Forest Management – approved

A. Carey Thin	CR-20-0244	2,200	MBF
B. Middle Fork Fox Creek	CR-20-0245	3,900	MBF
C. Last Sawlog	CR-30-0480	3,915	MBF
D. Bogus Renfro Pole	CR-30-0502	320	MBF
		144,110	LF
E. Chute	CR-40-0766	2,705	MBF
F. Church Canyon	CR-42-5003	1,395	MBF
G. Grayback Patches	CR-60-0161	3,440	MBF

4. Timber Sale Extension Policy – Staffed by Ron Litz, Assistant Director, Forestry and Fire – approved

DEPARTMENT RECOMMENDATION: That the Board adopt the following timber sale extension policy:

Policy on Existing Sales – For all timber sales contracts existing on or prior to June 13, 2004, the Department of Lands will utilize the contract extension policy in affect at the time, specifically that policy in effect on or before June 13, 2004 as stated in the Attachment A, History – Timber Sale Contract Extension Policy, appended to this document.

Policy on Sale Contacts Entered into beginning on or after June 14, 2004 –

1. The State expects purchasers of state timber sales to harvest said sales within the original contract period. Purchasers must recognize that extensions will be granted at the sole discretion of the State and are not automatic.
2. If a purchaser has made reasonable efforts to complete the sale within the original contract period, and still needs an extension of time to complete the sale, the Department may grant the purchaser an extension (1st extension) for up to one year, provided the purchaser has made a written request for said extension at least thirty days prior to the expiration date of the contract. The request must include a justification explaining why the sale could not be completed within the original contract period and must include a detailed logging plan with specific time lines for completing the sale within the 1st extension period.
3. In the event that a purchaser is unable to complete the sale within the 1st contract extension period due to unforeseen "extreme" circumstances beyond the purchaser's control, the Department may grant a 2nd extension for up to one year. The purchaser must make a written request for the 2nd extension at least thirty days prior to the expiration date of the 1st extension describing what unforeseen "extreme" circumstances precluded sale completion. The purchaser must also include a detailed logging plan with specific time lines for completing the sale within the 2nd extension period.

"Extreme" circumstances include, but are not limited to, catastrophic acts of nature (fire, blowdown, floods, earthquakes, etc.) that physically restrict the purchaser's access to the sale area, destruction of a purchaser's milling facilities or equipment by fire or catastrophic acts of nature, or by a court order related to compliance with state or federal environmental laws that are out of the purchaser's control. Depressed market conditions will not be considered "extreme" circumstances.

4. Any sale contract extension, after the 2nd extension, will only be granted by a vote of the Idaho Board of Land Commissioners, may only be granted under the "extreme" circumstances outlined in paragraph 3 above, and may contain such conditions as the State Board of Land Commissioners may, at its sole discretion, impose. Such conditions may include, but are not limited to, restrictions on bidding on new state sales, establishing various operational schedules, and/or requiring additional financial assurances.

5. Extension fees will be as follows:

A. Prepaid or lump sum sales:

Extension	Extension Fee
1 st	\$2.00 per acre or \$80, which ever is greater
2 nd	\$4.00 per acre or \$160, which ever is greater
All other extensions	Established by the Board

B. Scaled Sales:

- 1) The interest rate for timber harvested during the 1st or 2nd extension period:
 - a) Increase from the current sale interest rate to the current average monthly rate for conventional mortgages as quoted in the Federal Reserve statistical release, rounded downward to the nearest ¼ percent, if it is greater than the current sale interest rate, or
 - b) Remain at the current sale interest rate if the current average monthly rate for conventional mortgages as quoted in the Federal Reserve statistical release, rounded downward to the nearest ¼ percent, is less than the current sale interest rate.
 - 2) Fees associated with extensions granted after the 2nd extension will be set by the Land Board.
6. Any extension of a state timber sale shall include a provision requiring full compliance with the Timber Supply Stabilization Act.

DISCUSSION: Controller Johnson asked if the policy, where it refers to the Department making decisions on the first and second extension, means that the Board is giving up any authority for an appeal if the Department were to deny those extension requests. He asked if the Board overrides the decision of the Department. Director Wiggins responded that the purpose is to avoid bringing every extension request to the Board on a case-by-case basis. Timber sale extensions are included in the list of transactions that the Board approves on a monthly basis, but that have been granted by the Department. Would there be any case where the Department planned to deny an extension, a timber sale purchaser would have the right to request review of that decision by the Board. The Board decision then would be (a) whether to accept that appeal and (b) whether to uphold or deny it. In a case where the Department is going to deny an extension, the Board would know about it well in advance.

BOARD ACTION: Approved.

5. Authorization for Issuance of Deficiency Warrants to Pay Fire Suppression Costs in Fiscal Year 2004 – Staffed by Ron Litz, Assistant Director, Forestry and Fire – approved

DEPARTMENT RECOMMENDATION: Authorize the Department to issue deficiency warrants necessary to pay the fire suppression costs beyond the \$126,000 appropriation for fiscal year 2005.

DISCUSSION: Controller Johnson requested a clarification on item number 5, deficiency warrants. This item refers to the State Auditor, which technically should be the State Controller. He requested that a correction be made.

BOARD ACTION: Approved.

6. Request for Approval to Participate as a Member of the:
– Staffed by Ron Litz, Assistant Director, Forestry and Fire – approved

- A. Clearwater-Potlatch Timber Protective Association
- B. Southern Idaho Timber Protective Association

DEPARTMENT RECOMMENDATION: The State continue to participate as a member of the Clearwater-Potlatch Timber Protective Association and of the Southern Idaho Timber Protective Association.

BOARD ACTION: Approved.

7. Conveyance of the Borah Post Office to the State of Idaho as Federal Surplus Property for Use for Historic Monument Purposes – Staffed by Pamela I. Ahrens, Director, Department of Administration – This agenda item was moved to the Regular Agenda.

DEPARTMENT RECOMMENDATION: Accept title on behalf of the State and recognize control by the Department of Administration as proposed.

DISCUSSION: Superintendent Howard asked if any major renovations, in terms of handicap access or other issues, need to be made. Director Ahrens stated that most of those issues have been addressed, and the building is ADA compliant. Some restroom areas will need to be upgraded. In addition, the building will be maintained as a historical site, which includes different requirements than other State properties. Director Ahrens stated that her staff has worked with the Idaho State Historical Society to meet its requirements as well.

Governor Kempthorne noted that this property is 50% occupied. Some state agencies have already indicated a desire to move in. Other than perhaps painting and carpeting, this facility is structurally sound and does not need to undergo an extensive renovation. There is not an asbestos problem. It is in close proximity to the Capitol, and the acquisition of this building was attained for less than a dollar. Zero. Director Ahrens stated the building is in very good condition. Controller Johnson asked if the building is on the national register of historic places. Director Ahrens stated that it is.

BOARD ACTION: A motion was made by Superintendent Howard to accept the conveyance. Secretary of State Ysursa seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

8. Approval Request for Disclaimer of Interest to Sandy Beach Estates for Accretion Land Adjacent to the Snake River in Canyon County – Staffed by Dan Spanfeller, Real Estate Specialist – approved

DEPARTMENT RECOMMENDATION: It is recommended that a disclaimer of interest be issued for this parcel of land (totaling 0.94 acres, more or less) of the former bed of the Snake River. The recommended fee for the disclaimer is \$600.00.

BOARD ACTION: Approved.

9. Approval Request to Grant Easement to Fall River Rural Electric Cooperative, Inc., for Transmission Line – Staffed by Dan Spanfelner, Real Estate Specialist – approved

DEPARTMENT RECOMMENDATION: Direct the Department to issue an easement to Fall River Rural Electric Cooperative, Inc., for a consideration of \$24,256.06.

BOARD ACTION: Approved.

10. Approval Request for Disclaimer of Interest to Boise Corporation for Accretion Land Adjacent to the Payette River in Gem County – Staffed by Dan Spanfelner, Real Estate Specialist – approved

DEPARTMENT RECOMMENDATION: It is recommended that a disclaimer of interest be issued for this parcel of land (totaling 22.536 acres, more or less) of the former bed of the Payette River. The recommended fee for the disclaimer is \$600.00.

BOARD ACTION: Approved.

11. Adoption of Fee Schedule for Reclamation Fund – Staffed by Scott Nichols, Chief, Bureau of Surface and Mineral Resources – approved

DEPARTMENT RECOMMENDATION: Adopt the attached fee schedule, as required under the Administrative Rules Governing the Reclamation Bond Fund (20.03.03).

BOARD ACTION: Approved.

12. Minutes – approved

A. Regular Land Board Meeting – April 13, 2004

B. Regular Land Board Meeting – May 11, 2004

• **REGULAR**

13. Approval Request of Fiscal 2005 Land Sale Plan – Presented by Jay Biladeau, Assistant Director, Lands, Minerals, Range

DEPARTMENT RECOMMENDATION: Direct the Department to proceed with the appraisals with the understanding that final Board approval to sell each parcel will be requested prior to auction.

DISCUSSION: Governor Kempthorne asked if the auction is a sealed bid or live auction. Director Wiggins stated that the Department has always used oral auctions. However, he believes there is nothing that would prohibit staff from pursuing a sealed bid. Governor Kempthorne stated he feels an oral auction would generate additional revenue for the State.

Secretary of State Ysursa noted the Department would come back to the Board for approval. Clear Creek Lot 4 is part of the Heidi Baldwin situation and is a prime piece of real estate in Blaine County. He agreed with Governor Kempthorne that an oral auction would generate more income for Public Schools. He asked where the Department is on the timing of the auction. Director Wiggins responded that the appraisal contract is complete. Perry Whittaker, Chief, Bureau of Real Estate for the Department of Lands, confirmed that the appraisal contract is in. The Department plans to seek final approval for this particular parcel at the July 13 Land Board meeting.

Governor Kempthorne asked how this parcel will be advertised so any and all interested parties are well aware of it. Director Wiggins stated the Department will have an advertising plan for the Board. This particular parcel will have a wide distribution in some of the major metropolitan areas, certainly in the west. An advertisement will also be placed in the Wall Street Journal. Recently the Department put out a request for proposals on the Buttercup property. A tiny ad was displayed in the Wall Street Journal, and staff received a call within twenty minutes of the paper hitting the street. So there are people out there who are really paying attention to the real estate market and opportunities for purchase or development. Governor Kempthorne asked if the other parcel is contiguous. Director Wiggins stated he believes it is. Governor Kempthorne asked if any thought was given to retaining some portion of either this parcel or the second parcel because once developed the value again is increased. Director Wiggins stated the characteristics of these parcels make it difficult for that option. This particular parcel is 57 acres, but the building site is less than an acre. A good portion is fairly steep so the opportunities for future development are minor.

Superintendent Howard asked what kind of research was done by the Department concerning how current economic conditions nationwide are affecting real estate markets and prices. Director Wiggins stated the information is that the real estate market has improved over the last year or two. Staff research completed about a year ago went into detail about anticipated market conditions and real estate opportunities. The Department felt this was a good time to proceed based on that research. Staff is looking more at the timing of this on specific points during the calendar year when there would be more people inclined to bid.

Superintendent Howard asked about other lots. She noted some seem to have access problems. One lot is even under water part of every year. Director Wiggins stated he knows this parcel and there are a number of cabins in that area on stilts. Superintendent Howard asked about the landlock issues. She asked what the options are for the buyers. Director Wiggins stated that the lack of access will probably impact the bid price, but the cost and effort that the Department would have to go through to acquire access to what essentially is a low revenue parcel would outweigh the value received otherwise. Timing is also an issue. Access can be difficult, and sometimes access for a government agency is more difficult than access for private individuals. Those parcels will be auctioned. The Department will be up front about access, water issues and so forth. Then the anticipated bidders would calculate that information into their bid process.

Secretary of State Ysursa noted that some of the parcels were on last year's Land Sale Plan. He feels that all of the parcels, with the exception of Clear Creek-Lot 4, are minor. He reminded the Board that income generated from the auctions will be deposited in the Land Bank. This is the Board's first foray into the Land Bank, which was enabled by endowment reform in 1998. He hopes the Board will receive notice of the auction, and he plans to follow its progress. He has a deep feeling for this particular sale. It is one that former Secretary of State Pete Cenarrusa strived long and hard to keep on the front burner. This type of money going into the Land Bank will be helpful.

BOARD ACTION: A motion was made by Secretary of State Ysursa to approve the Land Sale Plan for FY05. Superintendent Howard seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

14. Grazing Lease G-4597, Lacey Meadows – Presented by Winston Wiggins, Director

DEPARTMENT RECOMMENDATION:

1. Award Grazing Lease G-4597 to WWP based on the following conditions:
 - a. WWP pays their premium auction bid of \$8,000.
 - b. WWP pays LMGA the cost of approved improvements as determined by resolution of the WWP appeal.

- c. A written management plan that is acceptable to the Department. Such plan must be in place prior to turn-out, but in no case later than July 12, 2004.
 - d. The duration of the lease will be ten years (to expire on December 31, 2013).
 - e. Require WWP to fence plantation areas in order to eliminate damage to seedlings.
 - f. Require the Department to certify, annually in December of each year, that the performance of WWP is satisfactorily meeting the objectives of the management plan.
 - g. If at any point the performance of WWP does not justify certification, the Department will recommend to the Land Board that the lease be cancelled.
2. Notify LMGA that the request for reconsideration is denied and that they have no right of use for state land within the Lacey Meadows allotment.
 3. Return LMGA premium bid of \$7,500.

DISCUSSION: For the record, Secretary of State Ysursa recused himself from this discussion. Director Wiggins provided background information for the Board.

Governor Kempthorne commented that the original high bid was submitted by Western Watersheds (WWP). At that time the Department's recommendation was not to award the lease to the highest bidder because the allotment is timberland and grazing was thought to be of benefit in this situation. Director Wiggins stated his memory is that the Board had at the time focused on what they believed to be the fire hazard reduction from grazing as it related to the timberland. Assistant Director Biladeau stated it was the fire management, grazing and the actual management plan submitted. Governor Kempthorne asked if there was a lack of a management plan by WWP. Assistant Director Bildadeau responded WWP did submit a management plan, but it did not adequately address the Department's concerns.

To summarize, Governor Kempthorne stated the lease was awarded to Lacey Meadows (LMGA) with certain conditions. LMGA asked the Board to reconsider because they felt the fencing condition in the lease was unrealistic. More fencing was being required than was necessary, and they had already agreed to a rider. Because of an elapsed timeline, the Board is unable to reconsider. Now the Department's recommendation is to award the lease to the high bidder. The Board received a letter from WWP wherein they welcomed the recommendation and award. However, they also had a concern about the proposed fencing and requested reconsideration of that condition.

Director Wiggins stated both parties requested reconsideration of the same issue, but they come to that issue from two totally different standpoints. On one hand, LMGA believes fencing the plantations is unnecessary, uneconomical, and that it is not needed because of the rider. Based on facts from the most recent contested case hearing process, staff identified damage in the plantations from cattle and anticipated damage would get worse in coming years if the plantations are not fenced. Governor Kempthorne asked if the damage took place prior to a full-time rider. Director Wiggins stated that the damage took place last summer and, at that time, LMGA had a full-time rider. Although the performance of LMGA was satisfactory in the past year, there was still intrusion into plantation areas when, in fact, the management plan stated there was to be no intrusion at all and that those areas were to be as if fenced.

Governor Kempthorne mentioned that WWP had, at least at the time of the bid, an appeal. He asked if the appeal had to do with restitution on the improvements made by LMGA. Director Wiggins stated the lease provides that in any case where a contestant is successful on a grazing lease, the new lessee is required to pay to the former lessee the appraised value of the improvements. The Department handles the appraisal and establishes the dollar figure. In this case, the appeal was filed ahead of time because the lease had not been awarded. WWP essentially told the Department if the lease was awarded to them, they did not agree with the appraisal on the improvements and that issue would have to be resolved.

Governor Kempthorne stated he finds it ironic that it all has to do with the fencing issue and that the Department recommendation is to now go back and award the lease to the first bidder. He asked what recourse the Board has other than to follow the Department's recommendation. He asked if there is a

means by which the Board could get a third party independent review of the whole fencing issue and then have that information come back to the Board. Director Wiggins deferred this question to the Attorney General's staff. He stated he does not know how that impacts the whole contested case issue. He can see where it reopens the whole matter and that it could be a situation where a Hearing Officer would have to convene once again to collect facts.

Governor Kempthorne asked when the cattle would normally be turned out. Director Wiggins stated June 1st. Governor Kempthorne noted there would be no grazing this year. Director Wiggins stated unless the Board decides to grant the rights to someone to graze this year, there would not be. Director Wiggins believes the Board has three choices. One, adopt the recommendation as is or with modifications. Secondly, not adopt the recommendation and grant the lease to LMGA with modifications. Third, leave the allotment ungrazed for this season. Where LMGA has asked to have their lease cancelled and the money returned, Governor Kempthorne asked if the Board has to take that pro-active step. He asked what would happen if the Board does not do that. Would the lease be cancelled or must the Board cancel it? Director Wiggins stated LMGA does not currently have a lease. For the last three years LMGA has operated under the terms of temporary permits. The last temporary permit expired at the end of the calendar year. Right now no one has grazing rights on the allotment. Governor Kempthorne asked for confirmation that LMGA did not enter into the seven-year lease offered to them by the Board. Director Wiggins stated they did not. In fact, they said the terms were unacceptable and that was when they asked that their premium bid be returned to them along with a refund of the development credits.

Governor Kempthorne noted that the likelihood is regardless of the direction the Board chooses, there will be no grazing this year. Director Wiggins stated if a lease is not granted to either party and if, in fact, a third party does not come in and offer to lease the property, then this is resolved and the answer would be that it will not be grazed. In fact, Director Wiggins stated he has alerted his staff to the possibility of increased monitoring and movement of cattle as necessary.

Superintendent Howard asked what the grazing season is on the allotment. Director Wiggins stated June 1st through the end of October.

Controller Johnson asked if the Board can issue a temporary permit to LMGA for this year. He believes, in the context of the grazing schedule, that would be an alternative. Secondly, he asked if, in fact, the allotment did not have any grazing this year, would the Department be required to do its own fencing of those plantations because of documented livestock trespass issues from adjoining allotments. Director Wiggins stated regarding trespass from adjoining allotments, the Department would take whatever measures necessary to protect the plantations. The Department has fenced plantations in the past and that cost was carried by the timber program.

Governor Kempthorne stated he still has a hard time with the idea that the Board is going to now award the lease to the first party that the Department recommended the Board deny. Also, that WWP's letter stated, for a different set of reasons, that they also have problems with the fencing. Include in that the fact that WWP submitted an insufficient management plan, and the fact that had the Board met prior to June 11 this would be an active issue that the Board could deal with. Director Wiggins stated that is correct. The current recommendation is back to WWP because LMGA turned the lease down. However, WWP will have to meet the conditions of submitting a management plan that meets the Department's approval and the fencing.

Superintendent Howard commented in the upcoming three to seven years plantations will be added to the allotment. She does not believe those plantations have ever been specified to anyone, and she wonders if LMGA or WWP have any idea what it means to have continual planting or plantations going on or what the effect would be in terms of fencing. She feels it is very awkward for the Board because it sees two different entities with two different purposes, and each entity needs different conditions. She asked how much time it would take to create certainty in terms of a long-range plan covering such topics as the kinds of plantations that would be put in, the places where fencing would be more necessary than others, what

type of fencing and who puts in the fencing. She asked what the down side is to simply moving forward with a temporary permit while the Board sorts out the particulars. She sees a tradeoff between no cows, but no supervision, and cows, and some supervision. She does not feel that is a fair tradeoff.

Should the Board's action result in a judicial review, Superintendent Howard asked what the question would be before the court. Deputy Attorney General Strack stated basically the question in the judicial review is whether the Board acted arbitrarily and capriciously in awarding the initial lease to LMGA. Because LMGA has now basically said it does not want the lease, it is up in the air as to what the exact issues would be. Deputy Attorney General Strack stated he would pretty much guarantee that if the Board was to simply suspend the leasing process and award a one-year permit to LMGA, the petition would be amended and would proceed along that basis. He anticipates that would be viewed as an end-run around the contested case procedures. If the lease is awarded to WWP, WWP would not have the ability to bring a contested case because they would not have standing to challenge the action. They would be the award bidders.

Governor Kempthorne asked if the Board goes back based on a Department recommendation and reverses itself, does that lend itself to being arbitrary and capricious? Director Wiggins stated in this case, LMGA has notified the Department in writing that they do not want the lease.

Governor Kempthorne asked what course of action does the Board have. If the Board goes with WWP, there will be no grazing. WWP also contests the condition of fencing. LMGA has made a financial investment, and the clock is ticking as to whether they can turn their cattle out and be of some benefit for fuels reduction. He asked if the Board has to acknowledge there will be no grazing this year. However, in that period of time the Board will sort this out and perhaps get a third party to provide a long-range plan and an understanding of where this really does go so there are no surprises and so that whomever gets the lease does not find each year a new stand or plantation requires additional fencing and cost.

Superintendent Howard stated there is no clear avenue in this matter that is not arbitrary. The issue of being arbitrary is trying to make a judgment on the basis of one set of standards and another set of standards for another. The issue of being capricious is one that would be just being flip about the law – just choosing out of a whim to go one way or another. The Board is not being whimsical. The Board is trying to think about how it looks at something that has two very different points of view and two very different uses and that has arbitrary issues built into it that are unstated yet which include planting of trees. She asked how many trees? How much land? Where? She feels that is the arbitrary issue. She stated she has to argue that it does not seem to her that the Board is acting in an arbitrary manner.

Controller Johnson stated his experience with the arbitrary and capricious standard is on the arbitrary side, it is important for the Board not to ignore significant facts or issues as they relate to what is being decided. On the capricious standard, making sure the Board is not trying to be punitive to either party. Controller Johnson stated it seems to him that the record of this case is clear that the Board has gone out of its way to avoid being arbitrary and capricious on either side. There are two parties. Both parties oppose the fencing of the plantations as being an onerous requirement of the lease yet a solution is needed. That is why he feels a temporary permit might be the best solution for the Board. A temporary permit would allow the Board time to look at the long-term planning for the plantations and protection of the trees.

Superintendent Howard stated the Board still has a problem in the sense that under discussions with LMGA the expectation of fencing came into play. Who pays for putting wire around a plantation while the Board decides where the plantations are going to be placed?

Governor Kempthorne asked what course of action does the Board have today because currently no lease exists. Both parties contest the fencing issue. LMGA does have a management plan, and they do have grazing capabilities. How does the Board award a temporary permit without notice? Director Wiggins stated there is a risk with whatever choice the Board makes. In developing his recommendations, Director Wiggins stuck to the facts to build a structured decision process with an ultimate goal of coming to a

conclusion. His recommendation is designed to work its way through the process to get to the other side without undue legal troubles.

Deputy Attorney General Strack stated the problem is that we are working under the Administrative Procedures Act, and the Board is bound by that Act by court order. Those procedures are very clear that there is one final order, which the Board made, in regard to awarding the lease to LMGA. LMGA had an opportunity to file a motion for reconsideration by law. Because that was not acted on within twenty-one days, the existing order became final. At this point, the Board, under the APA, does not have the ability to go back and reconsider its award, or the terms of that award, to LMGA. The temporary permit at this point would not allow the Board any additional time to sort through these facts and to come to a different conclusion regarding the fencing.

Deputy Attorney General Strack suggested one route is to follow the recommendation of the Director. Award the lease to WWP with the same conditions on fencing that were imposed on LMGA. If those conditions are not acceptable to WWP, and assuming the Board does not reconsider the order, it becomes final. Then a situation exists where neither party wants the lease. At that point the Board would have the ability to issue the temporary permit and the contested case is over. The lease could be put out for bid again. Then under the new lease, the Board and the Department would have the ability to reconsider the fencing issues and the payment, etc. The APA is controlling in this issue, and it is a very odd situation.

Mentioning the last paragraph in WWP's letter, Governor Kempthorne asked if the Board can reconsider at least the condition requiring fencing. Deputy Attorney General Strack stated at this point all we have is a recommended order so that can not be reconsidered. The Board can consider that an exception to the recommended order and the Board has the authority under the APA to alter the Director's recommendation in any manner it wants to before awarding the lease to WWP. But in terms of awarding the lease to LMGA, that is a final order. Basically at this point, because the reconsideration period has been expended, it is take it or leave it.

Governor Kempthorne noted no one is in the audience from LMGA to even indicate if they would be receptive to a temporary lease. He observed the Board has one course of action available, which is to do nothing. Then Department of Lands staff can go forward with a notice of temporary lease. Director Wiggins stated typically the Department will accept applications on unleased ground. It is not noticed.

Governor Kempthorne asked how the Board concludes that process so that it can begin again. Director Wiggins stated as he read the letter from WWP, they did not say they will not take the lease with that condition. They did bend in that direction. They asked that the Department, as a part of the recommended order, reconsider including that condition. They believe it is unnecessary. They asked that the Department talk with them about protecting the plantations.

Deputy Attorney General Strack stated one thing that is clear in this case is we have a recommended order, and, under the APA, the Board either has to deny, accept it or accept it with modifications in order to fulfill the APA duties. If the Board decides to award the lease to WWP, and they deny it, then the Board has fulfilled its APA duties and the contested case is over, pending any appeals. At that point there is a clean slate, and the Board can proceed with management of the parcel. Any further leases in this case would not be controlled by the APA, assuming that process takes place after July 1st.

Superintendent Howard asked what the effect of tabling this discussion would be. Deputy Attorney General Strack stated under the APA, once the recommended order is presented to the Board, the Board has fifty-six days to issue a final order or to remand the matter for additional hearings. If the Board decided not to accept the recommended order, it could remand the matter for additional hearings on the issue of fencing. There is one final order in this case. There is nothing the Board can do to go back and review that final order, basically awarding the lease to LMGA. LMGA rejected that final order. The process is now complete. So the hearing would be on the cost of the fencing and how the Board would handle that matter, assuming that the lease was awarded to the other bidder, which is WWP. This case has two bidders, and that is the controlling limits of the Board's discretion. The Board has fifty-six days to

issue a final order. If the Board chose to hold the matter over for the next month, that would be allowable under the APA.

Director Wiggins asked for a clarification. His recommendation today is a recommended final order. Does the fifty-six days start today if the Board took no action? Deputy Attorney General Strack stated if the recommendation was made today then, yes, the fifty-six days would start today. Director Wiggins asked if the fact that he made a recommended final order now supplants the final order from April. Deputy Attorney General Strack responded he is not sure what the question is. He feels this is one of the reasons why the APA is not a good fit for the bidding process. Usually an order affects one person. Here, if an order does not become final, you have the ability to issue a second order, which affects another party. Deputy Attorney General Strack assumes the Board's original final order still stands and has not been modified. If the Board simply waited fifty-six days, LMGA would still have the ability to accept the lease. LMGA's motion to reconsider was not necessarily an outright rejection of that. If LMGA chose to accept the lease, they would probably still have the ability to do that within those fifty-six days. But then the Board must act within those fifty-six days to either reject, accept or modify the recommended order. Director Wiggins asked if the Board decides to hold on this recommendation to seek more information to clarify some issues where there is disagreement, does that mean it needs to go back to the Hearing Officer to get that information? Deputy Attorney General Strack responded basically once you have a recommended order, there are two ways to get further information before the Board. The parties can either file briefs on the issues, which the Board could then consider and review the recommended order, or the Board can remand the matter back to the Hearing Officer for additional factual hearings.

Superintendent Howard stated she keeps returning to what the future Department plans are for the allotment and what affect it would have on the people who would use it. She asked if the Department has a ten-year plan in terms of plantations over that period of time. Director Wiggins stated the Department has a five-year plan that projects out on timber sale activities. The very specifics of that, as far as precise locations of clearcuts and so forth, are not known five years in advance because they are done on a site-specific basis. Conditions change over a period of time. The precise nature is not something we would know today. It is a standard lease term in timber production areas that the Department can remove plantation areas from leasing. The Department has fenced plantations through the years.

Superintendent Howard asked Director Wiggins if he was saying the Department did the fencing or the lessee did the fencing. Director Wiggins stated he misspoke. Plantations have been fenced. There have been instances where the Department did the fencing. Governor Kempthorne asked that the Department provide information to the Board on what the practice has been and when the Department has put in fencing. He asked what the conditions were and if it was in an area where grazing was allowed. Director Wiggins stated he would make that information available to the Board.

Superintendent Howard believes the Board needs to define the expectations and associated costs. Otherwise the lessee is operating blind with some unspoken expectations. Superintendent Howard moved that the Board seek more information to clarify the points of contention as identified both by the lessees and by members of the Land Board and bring that information forth within a fifty-six day timeframe as allowed under APA for a final decision by the Board. Deputy Attorney General Strack commented Superintendent Howard's motion would be within the terms of the APA with the provision that notification is given to the parties that they have the opportunity to provide additional briefing and information on the issue along with whatever staff memorandum that the Department would prepare. Superintendent Howard stated she would add that to her motion.

Controller Johnson asked if the motion was with an implicit understanding there would be no grazing this season. Superintendent Howard stated she did not address grazing at all. Her motion simply talks about the Board being in a limbo state with no lessee. Governor Kempthorne stated it is moot upon the question of grazing, but there would be no grazing or other use until the Board makes a final decision. For clarification, Director Wiggins stated fifty-six days would bring this matter before the Board at the July Land Board meeting unless a special meeting is called. Deputy Attorney General Strack stated the fifty-six days

is not necessarily fifty-six days from today. It is fifty-six days from the receipt of final briefs or oral argument on the motion. If the Board was to provide two or three weeks to the parties to provide briefs on the recommended order then it would be fifty-six days from that date and that would allow the Board to carry this matter over to the August Land Board meeting.

Governor Kempthorne stated, therefore, if the motion of the Superintendent simply says the Board is going to table this matter until further information has been obtained, that is the motion. We do not need to reference the fifty-six days. Deputy Attorney General Strack suggested that, to be safe, the Board include some kind of notice to the parties that we can review it in a certain time. The clock starts from the day that the briefs are submitted to the Board.

Controller Johnson withdrew his second in lieu of a new motion put forth by Superintendent Howard.

Superintendent Howard stated in light of a number of unanswered questions and interest in gathering more input from all parties and information, the Board would like to table this motion to allow more information to be gathered. Governor Kempthorne added that both parties will be notified of this so that if they so choose to give the Board additional information, they may do so. Deputy Attorney General Strack agreed. He pointed out that because there is a final order from the Board regarding LMGA, the time for appeal will begin and this will not stay the process. If they choose to appeal, they will have that ability during this fifty-six days additional timeframe.

Superintendent Howard stated she is basically asking to put forward a motion to table this with the understanding that all parties will be notified that they are invited to provide more information. The Board is also requesting more information from the Department of Lands. Controller Johnson seconded the motion. Governor Kempthorne noted the motion and second. There being no further discussion, those in favor voted aye with no opposing votes. Attorney General Wasden was absent for this vote; Secretary of State Ysursa recused himself from this vote.

BOARD ACTION: A motion was made by Superintendent Howard to table this agenda item with the understanding that all parties will be notified that they are invited to provide more information. Additional information is also being requested from the Department of Lands. Controller Johnson seconded the motion. The motion carried on a vote of 3-0, with Secretary of State Ysursa and Attorney General Wasden recused from this agenda item.

At 11:05 a.m. a motion was made by Controller Johnson to resolve into Executive Session. Secretary of State Ysursa seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

At 11:18 a.m. the Board resolved into Regular Session.

15. Director's Salary – Presented by Winston Wiggins, Director

DEPARTMENT RECOMMENDATION: That the pay of the Director of the Department of Lands be increased 2% in accordance with the FY-2005 budget beginning at the start of FY-2005.

BOARD ACTION: A motion was made by Secretary of State Ysursa to accept the Department recommendation. Superintendent Howard seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being absent for this vote.

- Information

Director Wiggins briefed the Board on the Information Agenda item. No Land Board action is required on the Information Agenda.

16. Conflicted Grazing Leases

- EXECUTIVE SESSION

- A. To Consider Records that are Exempt from Disclosure [[Idaho Code § 67-2345\(1\)\(d\)](#)]
- B. To Consider and Advise Its Legal Representatives in Pending Litigation or Where There is a General Public Awareness of Probable Litigation [[Idaho Code § 67-2345\(1\)\(f\)](#)]
- C. To Consider Personnel Matters [[Idaho Code § 67-2345\(1\)\(b\)](#)]

There being no further business to come before the Board, the meeting adjourned at 11:20 a.m.

IDAHO STATE BOARD OF LAND COMMISSIONERS

/s/ Dirk Kempthorne

President, State Board of Land Commissioners and
Governor of the State of Idaho

/s/ Ben Ysursa

Ben Ysursa
Secretary of State

/s/ Winston A Wiggins

Winston A Wiggins
Director

The above-listed final minutes were approved by the State Board of Land Commissioners at the July 13, 2004 regular Land Board meeting.